89-1186

No.

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1989

HARNEY & MOORE,
a Partnership and
DAVID M. HARNEY,
Petitioners,
vs.
JAY MARK FINEBERG,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEAL OF THE STATE OF CALIFORNIA, SECOND APPELLATE DISTRICT, DIVISION THREE

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QUESTIONS PRESENTED

1. Does a construction of California Business and Professions Code, section 6146 which precludes a waiver of the provisions thereof deprive a litigant of the right to a meaningful access to the courts in violation of the First Amendment of the Constitution of the United States?

2. Does a construction of California Business and Professions Code, section 6146 which precludes a waiver of the provisions thereof violate the due process clause of the Fourteenth Amendment of the Constitution of the United States?

3. Does a construction of California Business and Professions Code, section 6146 which precludes a waiver of the provisions thereof deprive a litigant of the right of the equal protection of the laws guaranteed by the Fourteenth Amendment of the Constitution of the United States?

LIST OF PARTIES

The parties to the proceedings below were the petitioners David M. Harney and Harney & Moore, a law partnership, and the respondent Jay Mark Fineberg.

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PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEAL OF THE STATE OF CALIFORNIA, SECOND APPELLATE DISTRICT, DIVISION THREE

The petitioners Harney & Moore, a law partnership, and David M. Harney respectfully pray that writ of certiorari issue to review the judgment and opinion of the Court of Appeal of the State of California, Second Appellate District, Division Three, filed on February 7, 1989 which the Supreme Court of the State of California declined to review by an order filed on April 26, 1989.

OPINION BELOW

The opinion of the Court of Appeal is reported at 207 Cal.App.3d 1049, and is reprinted in the Appendix hereto, p. A-1, *infra*.

JURISDICTION

The judgment of the Court of Appeal of California, Second Appellate District, Division Three, was entered on February 7, 1989. The Court of Appeal denied a timely petition for rehearing on March 3, 1989. Thereafter, on April 26, 1989 the Supreme Court of California denied a petition for hearing. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(3).

STATEMENT OF THE CASE

Facts

Respondent Jay Mark Fineberg, a film producer, engaged petitioner David M. Harney, an attorney admitted to the California Bar in 1949, and his firm, petitioner Harney & Moore, to represent him in connection with a medical malpractice action. The parties entered into a fee agreement dated November 23, 1981, which provided, in part: "'2. Client has been advised of the provisions of the California Business and Professions Code § 6146 which, in part, provides as follows: '§ 6146. Limitations in amount [¶] '(a) An attorney shall not contract for or collect a contingency fee for representing any person seeking damages in connection with an action for injury or damage against a health care provider based upon such person's alleged professional negligence in excess of the following limits: '(1) Forty percent of the first fifty thousand dollars ($50,000) recovered.

" '(2) Thirty-three and one-third of the next fifty thousand dollars ($50,000) recovered.

" '(3) Twenty-five percent of the next one hundred thousand dollars ($100,000) recovered.

" '(4) Ten percent of any amount on which the recovery exceeds two hundred thousand dollars ($200,000).

" 'Such limitations shall apply regardless of whether the recovery is by settlement, arbitration, or judgment, or whether the person for whom the recovery is made is a responsible adult, an infant, or a person of unsound mind.

" '(b) . . . .'

"Client has further been advised that attorneys are unwilling to accept representation herein under the provisions of said California Business and Professions Code § 6146, and client in order to obtain the services of said attorneys and in order to have action prosecuted as desired by client [], hereby waives the purported limitations on fees as set forth in said California Business and Professions Code § 6146, and hereby agrees to pay the fees as set forth in paragraph 3 below.

"3. That as sole compensation for services rendered by said attorneys, the client will pay them 40 percent of any money or property paid, received or collected by action, compromise, or otherwise. . . ."

The medical malpractice action was ultimately settled in October 1984, one provider paying plaintiff $275,000, and a second provider paying him $25,000. After deducting costs, Mr. Harney took 40 percent of the recovery in accordance with the fee agreement. Approximately a year afterwards,[1] plaintiff requested a refund ultimately determined to be $26,069.20, representing the amount by which the fee exceeded that permitted by statute. Mr. Harney refused to pay, and the present action ensued.

At trial, plaintiff testified that he contacted Mr. Harney because the firm was recommended to him by his brother.

---

[1] *Roa v. Lodi Medical Group, Inc.* (1985) 37 Cal.3d 920 which upheld section 6146 against constitutional challenges was decided February 7, 1985.

an Arizona attorney. He was advised that the firm would not undertake to represent him unless he waived the protection of section 6146; he was also advised that the firm would bear the expense of properly preparing the case for trial. He conceded he agreed to waive the statutory provisions governing contingent fee agreements, and that he did so because he wanted Mr. Harney to represent him. Plaintiff was pleased with Mr. Harney's handling of the case, as well as the settlement ultimately reached. However, he claimed Chris Matthews, of Harney, told him the fee would be 40 percent if the case went to trial, but only 33⅓ percent if the matter was settled out of court. He also claimed Matthews told him Harney was confident section 6146 was unconstitutional, and would soon be so ruled by the Supreme Court.

The trial court took judicial notice of the reputation and expertise of Harney and its predecessor firm. Harney proffered evidence establishing that the firm has overhead expenses, exclusive of costs advanced on cases, of $300,000 per month, employs three full-time in-house medical practitioners, advances all litigation costs, which in a case such as plaintiff's would generally amount to approximately $20,000, and aggressively pursues its cases, ordering all records and deposing all potential expert witnesses. In the opinion of Harney's legal expert, plaintiff could not have obtained comparable representation for a fee within the limits imposed by section 6141.

According to Mr. Harney's uncontradicted testimony the maximum settlement value of plaintiff's case, if handled by a personal injury lawyer who did not specialize in medical malpractice cases, was $100,000. There was additional and uncontradicted testimony that it is not economically feasible to conduct a proper practice in the field of medical malpractice with the fee restrictions imposed

by section 6146. (Section 6146 was revised effective January 1, 1988 to provide for a 25 percent fee for recoveries between $100,000 and $600,000 and a 15 percent fee for amounts recovered in excess of $600,000. Although the Court of Appeal found in its opinion that the fee schedule now is "more generous" [207 Cal.App.3d 1049, 1052, n. 1], there was uncontradicted testimony at trial that it is not economically feasible to conduct medical malpractice litigation with the fee restrictions imposed by section 6146. [R.T., pp. 33, 45.].)

The foregoing evidence was received in a non-jury trial in the Superior Court of the State of California. It was in all of its essential aspects uncontradicted.

How The Federal Question Was Presented

The Superior Court ruled that the fee limitation contained in Business and Professions Code, section 6146 could be and was waived and that respondent's waiver was knowing and intelligent. Judgment was entered in favor of petitioners and respondent appealed.

Respondent contended in the California Court of Appeal that public policy proscribed a waiver of section 6146. Petitioners, in their brief filed in the Court of Appeal, contended among other things that a construction of section 6146 which precluded a voluntary and knowing waiver of its provisions would violate the due process and equal protection clauses of the Fourteenth Amendment of the United States Constitution and would also deprive litigants of the right to petition the government for a redress of grievances, and thus violate the First Amendment of the United States Constitution. The Court of Appeal did not address the constitutional issues raised by petitioners and held that state public policy precluded a waiver of section 6146. In petitioning for review in the

California Supreme Court, petitioners raised the same federal constitutional issues briefed in the Court of Appeal. However, the California Supreme Court denied review of the Court of Appeal's decision without an opinion.

REASONS FOR GRANTING THE WRIT

I

STATE COURTS ARE REQUIRED TO DECIDE PROPERLY PRESENTED FEDERAL QUESTIONS; STATE GROUNDS WHICH IN EFFECT EVADE FEDERAL LAW SHOULD BE DISREGARDED

"In most situations it is clear that state courts are required to decide properly presented federal questions." (Wright, Miller, Cooper & Gressman, *Federal Practice and Procedure:* Jurisdiction, § 402, p. 716 (1988 Supp.) citing *Hawthorn v. Lovorn* (1982) 102 S.Ct. 2421, 2428-2430, 457 U.S. 255, 72 L.Ed.2d 824 [state court must examine claim that section 5 of the Voting Rights Act renders contemplated relief unenforceable].) Here, the Court of Appeal was presented with the contentions, renewed in the petition for review filed in the California Supreme Court, that a rule precluding waivers of section 6146 would violate the First and Fourteenth Amendments of the United States Constitution. We respectfully submit the Court of Appeal evaded federal law in failing to address the constitutional claims presented. This a state court may not do. (*Memphis Nat. Gas Co. v. Beeler* (1942) 62 S.Ct. 857, 861, 315 U.S. 649, 653-654, 86 L.Ed. 1090.) "Even though the constitutional protection invoked be denied on nonfederal grounds, it is the province of this Court to inquire whether the decision of the state court rests upon a fair and substantial basis." (*Demorest v. City Bank Farmers Trust Co.* (1944) 64 S.Ct. 384, 388, 321 U.S.

36, 42-43, 88 L.Ed. 526.) We submit that no such fair and substantial basis exists in this case.

The state grounds upon which the Court of Appeal's opinion rests are, we respectfully submit, transparently invalid for it ignores the explicit mandate of California law making section 6146 subject to waiver.

There is no provision in section 6146 which deals explicitly with a waiver. However, California Business and Professions Code, section 6147 [*Contingency fee contracts*] provides that "[f]ailure to comply with any provision of this section renders the agreement *voidable at the option of the plaintiff* and the attorney shall thereupon be entitled to collect a resonable fee." (emphasis added) (Business and Professions Code, section 6147(b).)

Responding to petitioners' contention that this provision explicitly authorized a waiver, the Court of Appeal held:

> "Harney also relies on section 6147, requiring, in subdivision (a), that certain provisions be included in contingency fee agreements, and providing, in subdivision (b) that '[f]ailure to comply with any provision of this section renders the agreement voidable at the option of the plaintiff, and the attorney shall thereupon be entitled to collect a reasonable fee.' Among the recitals required by subdivision (a) are the following: '(4) Unless the claim is subject to the provisions of Section 6146, a statement that the fee is not set by law but is negotiable between attorney and client. [¶] (5) If the claim is subject to the provisions of Section 6146, a statement that the rates set forth in that section are the maximum limits for the contingency fee agreement, and that the attorney and client may negotiate a lower rate.'

> Contrary to Harney's assertion, section 6147 makes abundantly clear the intent of the Legislature to preclude contingency fee agreements providing for rates in excess of the limits set forth in section 6146; *it is the failure to recite this which renders an agreement voidable under subdivision (b) of section 6147.*" (emphasis added) (*Fineberg v. Harney & Moore, supra* 207 Cal.App.3d 1049, 1055.)

By the very terms of the Court of Appeal's opinion, the fee agreement in this case is voidable. It does *not* recite that the rates set forth in section 6146 are the "maximum limits of the contingency fee agreement." (*Business and Professions Code*, section 6147(a)(5).) *The limit set forth in the fee agreement is 40 percent.* The law provides most unambiguously that in such an event the agreement is voidable at the option of the plaintiff. (*Business and Professions Code*, section 6147(b).) As if it needed reinforcement, the unequivocal wording of section 6147(b) making fee agreements *voidable* has received the gloss of judicial approval in a recent decision of the California Court of Appeal. "If a contingency fee agreement does not comply with these requirements, it is *voidable at the option of the client* and the attorney is then entitled to a reasonable fee for services performed. (Bus. & Prof. Code, Section 6147, subd. (b)." (emphasis in original) [*Alderman v. Hamtilton* (1988) 205 Cal.App.3d 1033, 1037.])

We contend that the patent misreading of Business and Professions Code, section 6147(b) by the Court of Appeal shows that the purported state grounds for the decision are neither fair nor substantial. We submit the state grounds were advanced in order to avoid confronting the federal constitutional issues raised in a timely manner in the briefs filed in the Court of Appeal. For this reason,

the state grounds are not adequate and independent (*Herb v. Pitcairn* (1945) 65 S.Ct. 459, 463, 324 U.S. 117, 125-126, 89 L.Ed. 789) and therefore the federal constitutional questions presented may be addressed by this Court.

II

A CONSTRUCTION OF SECTION 6146 WHICH PRECLUDES A WAIVER THEREOF DEPRIVES A LITIGANT OF THE CONSTITUTIONAL RIGHT TO PETITION THE GOVERNMENT FOR A REDRESS OF GRIEVANCES AND WOULD FURTHER DEPRIVE THAT LITIGANT OF THE RIGHT TO BE REPRESENTED BY COUNSEL OF HIS OR HER CHOICE

The constitutional right to petition for redress of grievances (U.S. Const., 1st Amend.) includes the right of access to the courts. (*California Motor Transport Co. v. Trucking Unlimited* (1972) 92 S.Ct. 609, 612, 404 U.S. 508, 510, 30 L.Ed.2d 642.) This encompasses lawsuits for monetary compensation for individualized wrongs. (*City of Long Beach v. Bozek* (1982) 31 Cal.3d 527, 533 *vac.* 459 U.S. 1095 *reinst'd* 33 Cal.3d 727 citing *United Mine W. of A., Dist. 12 v. Illinois St. Bar Assn.* (1967) 88 S.Ct. 353, 356, 389 U.S. 217, 223, 19 L.Ed.2d 426, 431.) Under the Constitution, the right to petition, which includes the right to institute judicial proceedings, is a fundamental right. (*United Mine W. of A., Dist. 12 v. Illinois St. Bar Assn., supra* 88 S.Ct. 353, 356, 389 U.S. 217, 222, 19 L.Ed.2d 426, 430.) And the right to be represented in a civil or criminal proceeding by counsel of one's choice has long been recognized as a fundamental right protected by the due process clause. (*Powell v. Alabama* (1932) 53 S.Ct. 55, 64, 287 U.S. 45, 68-69, 77 L.Ed. 159.)

In the case at bar, respondent made a deliberate choice of counsel (R.T., pp. 17, 59) and waived the provisions of section 6146 in order to retain the lawyers chosen (R.T., p. 21) who would not take his case without a waiver of section 6146. (R.T., pp. 31, 45.) We submit that precluding a knowing and intelligent waiver of section 6146 would have curtailed in this case and will curtail in future cases the effective exercise of the right to bring a lawsuit and thus interfere with the fundamental right to petition for a redress of grievances and with the right to be represented by counsel of one's choice.

In *Walters v. National Ass'n of Radiation Survivors* (1985) 105 S.Ct. 3180, 473 U.S. 305, 87 L.Ed.2d 220, while upholding against constitutional challenge the $10 limit on fees to be paid an attorney or agent appearing on behalf of a veteran before the Veteran's Administration, this Court suggested that a First Amendment interest arises in fee limitations in the absence of a meaningful alternative forum for the presentation of claims. (473 U.S. at 333-335, 105 S.Ct. at 3195-3197.) *There is no meaningful alternative forum* to the civil action filed on appellant's behalf by respondents for the litigation of his medical malpractice claim. Nor is an action for medical malpractice as "informal and nonadversial as possible" as is true of veteran's benefits proceedings at issue in *Walters*. (473 U.S. at 323, 105 S.Ct. 3190.) The very opposite is true; the record in this case shows the value (and necessity) not only of legal representation but of *expert* legal representation.

That this case is one of constitutional dimension is apparent in light of the *Walters* decision. Apart from violating specific constitutional provisions, a judicial construction of section 6146 which precludes its waiver implicates the broad societal interest of assuring the right to a

meaningful access to the courts. That a fully informed, well-advised and even sophisticated litigant should be free to forego the fee schedule set in section 6146 because he wants a *particular* lawyer to represent him is, simply put, an important constitutional value. As one prominent commentator has written: "A right to meaningful access to court may also be implicated by denials of adequate legal representation, and even by denials of the legal representation of one's choice." (Tribe, *American Constitutional Law* (2d ed. 1988), p. 757.)

This is indeed a case where no informal alternative to the usual adversary process is available. A litigant's choice of counsel for the only proceedings which can vindicate his or her rights should therefore not be circumscribed.

We contend in this case that the right to retained counsel, long recognized in our law, includes the right to choose counsel believed to be competent and adequate. The facts of this case uniquely support this argument: it is fact, not speculation, that petitioners were competent and effective and were able to obtain results for respondent which other lawyers less expert would not have been able to obtain. Respondent waived section 6146 because he wanted precisely the result achieved. His right to that result as well as the right of future litigants to make sensible choices to achieve similar results is and should be protected by the Constitution. For this reason, the opinion and judgment of the California Court of Appeal should be set aside and litigants should be permitted to waive the provisions of California Business and Professions Code, section 6146.

III

A CONSTRUCTION OF SECTION 6146 WHICH PRECLUDES A WAIVER THEREOF DEPRIVES A LITIGANT OF THE CONSTITUTIONAL RIGHT TO THE EQUAL PROTECTION OF THE LAWS

California Business and Professions Code, section 6146 creates a class of litigants — those with actions for professional negligence against a health care provider — who do not have the right to retain counsel of their choice. Litigants in other civil actions continue to have the right to retain counsel selected by them. That such a class is actually created by section 6146 is apparent from the record of this case. Respondent selected petitioners but he would not have been able to retain them if he could not have waived freely and knowingly, as he did, the fee schedule set forth in section 6146.

The equal protection clause requires "some rationality in the nature of the class singled out." (*Rinaldi v. Yaeger* (1966) 86 S.Ct. 1497, 1499, 384 U.S. 305, 308-309.) "Rationality" is tested by the classification's ability to serve the purpose of the legislative rule. (*McLaughlin v. State of Florida* (1964) 85 S.Ct. 283, 288, 379 U.S. 184, 191.) We submit that the purpose of MICRA is not served by precluding a litigant from retaining the attorney of his or her choice.

In the instance of the litigants' class, the standard against which the classification at bar is to be measured is not one of rationality alone. The test which applies is the more exacting "strict scrutiny" standard of judicial review.

As noted, the right to petition, which includes the right to institute judicial proceedings, is a fundamental right. (*United Mine W. of A., Dist. 12 v. Illinois St. Bar Assn.*,

supra 88 S.Ct. 353, 356, 389 U.S. 217, 222, 19 L.Ed.2d 426, 430.) The right to a hearing which includes the right to retained counsel, is also fundamental. (*Powell v. Alabama*, *supra* 287 U.S. 45, 68, 62 S.Ct. 55, 64.) Law making differentiations between persons exercising fundamental rights are subject to strict judiciary scrutiny and will not be upheld unless it can be demonstrated that it is *necessary* to use the classification to promote a *compelling* state interest. (*Dunn v. Blumstain* (1972) 405 U.S. 330, 339-340, 92 S.Ct. 995, 1001 [travel and voting]; *Shapiro v. Thompson* (1960) 394 U.S. 618, 634, 89 S.Ct. 1322, 1331 [interstate travel]; *Kramer v. Union Freed School District* (1969) 395 U.S. 621, 630, 89 S.Ct. 1886, 1891 [voting]; *Loving v. Virginia* (1967) 388 U.S. 1, 11, 87 S.Ct. 1817, 1823 [marriage].)

> "Business and Professions Code section 6146 was enacted as part of the Medical Injury Compensation Reform Act of 1975 (MICRA). (Stats. 1975, 2d Ex. Sess. 1975-1976, chs. 1, 2, pp. 3949-4007.) MICRA, 'a sweeping statute that enacted, amended, or repealed several sections of the Business and Professions Code, the Civil Code, the Code of Civil Procedure, and the Insurance Code' (*Hathaway v. Baldwin Park Community Hospital* (1986) 186 Cal.App.3d 1247, 1250 [231 Cal.Rptr. 334]), was enacted in an extraordinary legislative session called by the Governor in response to 'a perceived crisis cause by rapid increases in medical malpractice insurance premiums.'" (*Fineberg v. Harney & Moor*, *supra* 207 Cal.App.3d 1049, 1052.)

California courts have held that the Legislature's purpose in enacting MICRA was to protect California's health care delivery system by reducing the cost of medi-

cal malpractice insurance. (*Fineberg v. Harney & Moore, supra* 207 Cal.App.3d 1049, 1054.)

We submit that MICRA's aim of combating the medical malpractice insurance crises (*American Bank & Trust Co. v. Community Hospital* (1984) 36 Cal.3d 359, 363), when compared to precedent, is not a "compelling" reason to curtail the exercise of appellant's fundamental rights. As one authority has explained, a "compelling" interest is one "whose value is so great that it justified the limitation of fundamental constitutional values." (Nowak, Rotunda and Young, *Constitutional Law*, (West 2d ed.) pp. 591, 592.) A crisis in insurance rates does not measure up to matters of national security, life and death and the eradication of racial discrimination.

However, even if the interest is "compelling," and we do not concede it is, the means chosen must be *necessary* to effectuate the compelling objective. The network of MICRA statutes is so extensive, and the limitation on recoveries so direct, that a number of voluntary and well-informed waivers of section 6146 can hardly have a measurable effect, or any effect, on medical malpractice insurance costs. Even if all that has been done is not considered enough to control malpractice insurance costs, surely there are other less restrictive means of combating the insurance crises than to compel *some* individuals to relinquish the fundamental rights to retain counsel of their choice and the First Amendment right to petition for a redress of grievances. In sum, we submit that precluding a waiver of section 6146 would violate the equal protection clause of the Constitution.

CONCLUSION

For the foregoing reasons, this petition for certiorari should be granted.

Respectfully submitted,

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APPENDIX A

OPINION AND JUDGMENT OF THE CALIFORNIA COURT OF APPEAL

Opinion

DANIELSON, Acting P. J. — Plaintiff and appellant Jay Mark Fineberg appeals from the judgment entered in favor of defendants and respondents Harney & Moore and David M. Harney (Harney) in an action to recover contingent fees in excess of the limit imposed thereon by Business and Professions Code section 6146. (1a) The primary question presented by this appeal is whether a client may waive the provisions of the statute. We determine the statute was intended to further a significant public policy and that its protection cannot be waived, and reverse the judgment.

FACTS

Plaintiff engaged Harney to represent him in connection with a medical malpractice action. The parties entered into a fee agreement dated November 23, 1981, which provided, in part: "2. Client has been advised of the provisions of the California Business and Professions Code § 6146 which, in part, provides as follows: '§ 6146. Limitations in amount [¶] '(a) An attorney shall not contract for or collect a contingency fee for representing any persons seeking damages in connection with an action for injury or damage against a health care provider based upon such person's alleged professional negligence in excess of the following limits: '(1) Forty percent of the first fifty thousand dollars ($50,000) recovered.

" '(2) Thirty-three and one-third percent of the next fifty thousand dollars ($50,000) recovered.

"'(3) Twenty-five percent of the next one hundred thousand dollars ($100,000) recovered.

"'(4) Ten percent of any amount on which the recovery exceeds two hundred thousand dollars ($200,000).

"'Such limitations shall apply regardless of whether the recovery is by settlement, arbitration, or judgment, or whether the person for whom the recovery is made is a responsible adult, an infant, or a person of unsound mind.

"'(b) ....'

"Client has further been advised that attorneys are unwilling to accept representation herein under the provisions of said California Business and Professions Code § 6146, and client in order to obtain the services of said attorneys and in order to have action prosecuted as desired by client[], hereby waives the purported limitations on fees as set forth in said California Business and Professions Code § 6146, and hereby agrees to pay the fees as set forth in paragraph 3 below.

"3. That as sole compensation for services rendered by said attorneys, the client will pay them 40 percent of any money or property paid, received or collected by action, compromise, or otherwise . . . "

The medical malpractice action was ultimately settled, one provider paying plaintiff $275,000, and a second provider paying him $25,000. After deducting costs, Harney took 40 percent of the recovery in accordance with the fee agreement. Thereafter, plaintiff requested a refund of $26,069.20, representing the amount by which the fee exceeded that permitted by statute. Harney refused to pay, and the present action ensued.

At trial, plaintiff testified he contacted Harney because the firm was recommended to him by his brother, an

Arizona attorney. He was advised that the firm would not undertake to represent him unless he waived the protection of section 6146; he was also advised that the firm would bear the expense of properly preparing the case for trial. He conceded he agreed to waive the statutory provisions governing contingent fee agreements, and that he did so because he wanted Harney to represent him. Plaintiff was pleased with Harney's handling of the case, as well as the settlement ultimately reached. However, he claimed Chris Matthews, of Harney, told him the fee would be 40 percent if the case went to trial, but only 33⅓ percent if the matter was settled out of court. He also claimed Matthews told him Harney was confident section 6146 was unconstitutional, and would soon be so ruled by the Supreme Court.

The trial court took judicial notice of the reputation and expertise of Harney and its predecessor firm. Harney proffered evidence establishing that the firm has overhead expenses, exclusive of costs advanced on cases, of $300,000 per month, employs three full-time in-house medical practitioners, advances all litigation costs, which in a case such as plaintiff's would generally amount to approximately $20,000, and aggressively pursues its cases, ordering all records and deposing all potential expert witnesses. In the opinion of Harney's legal expert, plaintiff could not have obtained comparable representation for a fee within the limits imposed by section 6146.

Harney claimed the maximum settlement value of plaintiff's case, if handled by a personal injury lawyer who did not specialize in medical malpractice cases, was $100,000, and that it was not economically feasible to

conduct a proper practice in the field of medical malpractice with the fee restrictions imposed by section 6146.[1]

The trial court ruled (1) there was no public policy factor pertaining to the limitations on contingent fee agreements set forth in Business and Professions Code section 6146, and (2) plaintiff waived the protection of the statute, and entered judgment in favor of the defendants.

Discussion

Business and Professions Code section 6146 was enacted as part of the Medical Injury Compensation Reform Act of 1975 (MICRA). (Stats. 1975, 2d Ex. Sess. 1975-1976, chs. 1, 2, p. 3949-4007.) MICRA, "a sweeping statute that enacted, amended, or repealed several sections of the Business and Professions Code, the Civil Code, the Code of Civil Procedure, and the Insurance Code" (*Hathaway v. Baldwin Park Community Hospital* (1986) 186 Cal.App.3d 1247, 1250 [231 Cal.Rptr. 334]), was enacted in an extraordinary legislative session called by the Governor in response to "a perceived crisis caused by rapid increases in medical malpractice insurance premiums." (*Ibid.*) In his proclamation, the Governor called for the Legislature to " 'enact laws which will change the relationship between the people and the medical profession, the legal profession and the insurance industry, and thereby reduce the costs which underlie these high insurance premiums.' " (*Ibid.*) The Governor asked the Legislature to consider, among other things: " '8. Establishment of reasonable limits on the amount of contingency fees charged by attorneys.[¶] 9. Elimination

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[1]We note that Business and Professions Code section 6146 has since been amended to permit more generous fees.

of double payments ("collateral sources"); institution of periodic payments and reversionary trusts; limitation of compensation for pain and suffering while insuring fully adequate compensation for all medical costs and loss of earnings; and setting a reasonable statute of limitations for the filing of malpractice claims.' " (*Ibid.*)

As the *Hathaway* court observed, "[t]he preamble to MICRA states, in part: 'The Legislature finds and declares that there is a major health care crisis in the State of California attributable to skyrocketing malpractice premium costs and resulting in a potential breakdown of the health delivery system, severs hardships for the medically indigent, a denial of access for the economically marginal, and depletion of physicians such as to substantially worsen the quality of health care available to citizens of this state. The Legislature, acting within the scope of its police powers, finds the statutory remedy herein provided is intended to provide an adequate reasonable remedy within the limits of what the foregoing public health and safety considerations permit now and into the foreseeable future.' (Stats. 1975, Second Ex. Sess. 1975-1976, ch. 2, § 12.5, p. 4007.)" (*Hathaway v. Baldwing Park Community Hospital, supra,* 186 Cal.App.3d at p. 1250.)

Our Supreme Court has upheld MICRA's provisions (1) calling for periodic payment of "future damages" that are $50,000 or greater (Code Civ. Proc., § 667.7; *American Bank & Trust Co. v. Community Hospital* (1984) 36 Cal. 3d 359, 364 [203 Cal.Rptr. 671, 683 P.2d 670, 41 A.L.R.4th 233]), (2) prohibiting "collateral sources" from obtaining reimbursement from medical malpractice defendants or their insurers (Civ. Code, § 333.1, subd. (b); *Barme v. Wood* (1984) 37 Cal.3d 174, 180 [207 Cal.Rptr. 816 [689 P.2d 446]), (3) limiting damages for

noneconomic losses to $250,000 (Civ. Code, § 3333.2, subd. (b)) and permitting a defendant to introduce evidence of benefits a plaintiff has received from a collateral source (Civ. Code, § 3333.1, subd. (a)), (*Fein v. Permanente Medical Group* (1985) 38 Cal. 3d 137, 158-159 [211 Cal.Rptr. 368, 695 P.2d 665]). The court has also held (4) that the statute here in question, Business and Professions Code section 6146, limiting the amount of fees an attorney may collect when representing a plaintiff in a medical malpractice action on a contingency basis, is rationally related to the legislations' legitimate objective and therefore does not violate the due process or equal protection clauses. (*Roa v. Lodi Medical Group, Inc.* (1985) 37 Cal.3d 920, 931-932 [211 Cal.Rptr. 77, 695 P2d 164].)

In each of these cases, the court recognized that the Legislature's purpose in enacting MICRA was to protect California's health care delivery system by reducing the cost of medical malpractice insurance. (See also *Miller v. Sciaroni* (1985) 172 Cal.App.3d 306, 309-310 [218 Cal.Rptr. 219].)

In *Hathaway, supra,* Division One of this court concluded that section 6146 prohibits a trial court from awarding attorneys' fees in excess of the rates provided therein. *Hathaway* is similar to the present case, in that the clients petitioned the court, seeking permission to pay their attorney one-third of the amount they recovered in the case, rather than the much lower amount prescribed by the statute, thus essentially waiving the protection of the statute. (*Hathaway v. Baldwin Park Community Hospital, supra,* 186 Cal.App.3d 1247, 1249.) Also similar is *Roa v. Lodi Medical Group, Inc., supra,* 37 Cal.3d 920, where the plaintiffs made a contingency fee arrangement with their counsel to pay him 25 percent of the amount

recovered by their minor son for injuries suffered as a result of negligent treatment and care during his birth. Following settlement, plaintiffs requested the court to approve payment in accordance with their agreement, claiming section 6146 was unconstitutional on due process, equal protection and separation of powers grounds. As the court pointed out in that case, section 6146 "does not in any way abrogate the right to retain counsel, but simply limits the compensation that an attorney may obtain when he represents an injured party under a contingency fee arrangement." (*Id.* at p.926.) With respect to the *Roa* plaintiffs' argument that section 6146 is invalid "because the authorized fees are so low that in practice the statute will make it impossible for injured persons to retain an attorney to represent them" (*id.* at p.928), the court pointed out that the plaintiffs had made "no showing to support their factual claim" (*ibid.*), and "[f]urthermore, a comparison of the fees permitted by section 6146 with the fees authorized under . . . numerous [other] statutory schemes noted [in the decision] suggests that section 6146's limits are not unusually low." (*Ibid.*) The court concluded that it could not "hold that the amount of the fees permitted renders the statute unconstitutional on its face." (*Ibid.*)

(2) In the present case Harney attempted to make a factual showing that the fee limitations in effect at the time of its representation of plaintiff would preclude retention by injured persons of adequate counsel. Implicit in the testimony of both David Harney and his expert is their assumption either that no lawyer would undertake representation of medical malpractice plaintiffs under the statutory fee limitation, or that lawyers engaged in that practice would lower the standard of representation afforded medical malpractice clients because of the fee limitation. The first of these assumptions is purely specu-

lative; the second assumes a willingness on the part of medical malpractice lawyers, as a group, to violate their duty to their clients. We reject both assumptions, and find no deprivation of the right to counsel by reason of the statutory provision in question.

(1b) We also reject Harney's claim that the Legislature intended to permit waivers of section 6146. We find nothing in the legislative history of section 6146 to suggest an intent to make the statute voidable. The June 12, 1975, amendment to which Harney refers in its brief, which was deleted by a further amendment on June 27, 1975, permitted, as had two previous versions of the statute, contingency fee agreements containing terms other than those prescribed by the fee schedule set forth in subdivision (a) of section 6146, but provided that such a contract "is void unless such contract is approved by the court in which the action is pending." In deleting this version of subdivision (b) of the section the Legislature did not make such agreements voidable, rather than void; it is eliminated them altogether.

Harney also relies on section 6147, requiring, in subdivision (a), that certain provisions be included in contingency fee agreements, and providing, in subdivision (b) that "[f]ailure to comply with any provision of this section renders the agreement voidable at the option of the plaintiff, and the attorney shall thereupon be entitled to collect a reasonable fee." Among the recitals required by subdivision (a) are the following: "(4) Unless the claim is subject to the provisions of Section 6146, a statement that the fee is not set by law but is negotiable between attorney and client. [¶] (5) If the claim is subject to the provisions of Section 6146, a statement that the rates set forth in that section are the maximum limits for the contingency fee agreement, and that the attorney

and client may negotiate a lower rate." Contrary to Harney's assertion, section 6147 makes abundantly clear the intent of the Legislature to preclude contingency fee agreements providing for rates in excess of the limits set forth in section 6146; it is the failure to recite this which renders an agreement voidable under subdivision (b) of section 6147.

Finally, the Legislature expressed its purpose in enacting MICRA, and that purpose is a public one, i.e., reduction of medical malpractice insurance premiums costs to ensure continued delivery of quality health care to the citizens of this State. "[A] law established for a public reason cannot be contravened by a private agreement." (Civ. Code, § 3513.)

We conclude there is nothing in the statutory scheme, or its legislative history, indicating that the Legislature intended to permit waiver of the provisions of Business and Professions Code section 6146 by parties to a contingency fee agreement in a medical malpractice case, and moreover, that such waiver is precluded by Civil Code section 3513. (See *Waters v. Bourhis* (1985) 40 Cal.3d 424, 439, fn. 15 [220 Cal.Rptr. 666, 709 P.2d 469]; *Shepherd v. Greene* (1986) 185 Cal.App.3d 989, 992 [230 Cal.Rptr. 233].)

DECISION

The judgment is reversed. Respondents are to bear costs on this appeal.

Arabian, J., and Croskey, J., concurred.

APPENDIX B

ORDER DENYING REVIEW

AFTER JUDGMENT BY THE COURT OF APPEAL

2nd District, Division 3, No. B032887 S009406

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

IN BANK

JAY MARK FINEBERG

v.

HARNEY & MOORE, ETC., ET AL.

Respondents' petition for review DENIED.

Mosk, J., is of the opinion the petition should be granted.

LUCAS

Chief Justice

PROOF OF SERVICE BY MAIL

STATE OF CALIFORNIA
COUNTY OF LOS ANGELES } ss.:

I am a citizen of the United States and a resident of or employed in the City of Los Angeles, County of Los Angeles; I am over the age of 18 years and not a party to the within action; my business address is 1706 Maple Avenue, Los Angeles, California 90015.

On July 21, 1989, I served the within Petition for Writ of Certiorari in re: "Harney & Moore v. Jay Mark Fineberg" in the United States Supreme Court October Term 1989, No. , on all parties interested in said action, by placing three copies thereof enclosed in a sealed envelope, with postage thereon fully prepaid, in the United States Post Office mail box at Los Angeles, California, addressed as follows:

Sanders, Firestein & Janeway
Marshall C. Sanders
Thomas H. Janeway
16530 Ventura Boulevard
Room 600
Encino, California 91436

All parties required to be served have been served.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on July 21, 1989, at Los Angeles, California.

J. GORDON HOOPER

No. 89-136

In The

Supreme Court of the United States

October Term, 1989

HARNEY & MOORE, a Partnership and
DAVID M. HARNEY,

Petitioners,

vs.

JAY MARK FINEBERG,

Respondent.

On Petition For Writ Of Certiorari To The California Court of Appeal, Second Appellate District, Division Three

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

The questions presented for review by the Petition for Writ of Certiorari should properly be phrased as follows:

1. Did the state courts address and correctly decide the federal questions raised by Petitioners on appeal?

2. Does the mandatory fee limitation imposed by California Business and Professions Code Section 6146 deprive a litigant of his right to retain counsel under the due process clause of the Fourteenth Amendment of the United States Constitution?

3. Does the mandatory fee limitation imposed by California Business and Professions Code Section 6146 deprive a litigant of the constitutional right to petition the government for a redress of grievances?

4. Does the mandatory fee limitation imposed by California Business and Professions Code Section 6146 deprive a litigant of the constitutional right to equal protection of the laws guaranteed under the Fourteenth Amendment of the United States Constitution?

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RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

STATEMENT OF THE CASE

FACTS

Respondent JAY MARK FINEBERG ("FINEBERG") filed his Complaint in this action against Petitioners HARNEY & MOORE and DAVID M. HARNEY[1] on January 29, 1986 for imposition of a constructive trust, for breach of statutory duty, for money had and received, and for declaratory relief. The gravamen of FINEBERG's Complaint was that Petitioners had impermissably induced him to enter into a contingent fee agreement for legal services in connection with a medical malpractice action which contravened the mandatory statutory limitations imposed by California *Business and Professions Code* §6146[2]. The relief requested by FINEBERG in the instant action includes a refund of the amount due him, with interest at the rate of ten percent per annum from the date on which Petitioners wrongfully withheld the money, together with a request for a declaration of the rights of the parties pursuant to the contingent fee agreement and *Business and Professions Code* §6146, and for imposition of a constructive trust.

---

[1] The Complaint also named as a Defendant CHRISTOPHER GRANVILLE-MATHEWS who was dismissed from the case before an answer was filed (C.T. page 93)

[2] In 1975 the California Legislature enacted the Medical Injury Compensation Reform Act ("MICRA"), including §6146, in response to a perceived crisis in the health care delivery system, to reduce the cost of medical malpractice insurance.

On May 21, 1986 Petitioners filed a Cross-Complaint of which only the Fourth Cause of Action, for declaratory relief, remained before the court at the time of trial. The First, Second and Third Causes of Action were dismissed by the court pursuant to a demurrer filed by Respondent, and Petitioners elected not to file an amended Cross-Complaint.

On May 21, 1986 Petitioners also filed their Answer denying the allegations of the Complaint and affirmatively alleging, in relevant part, that Respondent waived the fee limitations set forth in *Business and Professions Code* §6146, and in doing so never intended *Business and Professions Code* §6146 to apply to the fee agreement.

The trial came on regularly for hearing on November 6, 1987 in Department 19 of the Los Angeles County Superior Court, the Honorable Robert Fainer, Judge Presiding, sitting without a jury; a jury having been duly waived by the parties. Because the trial took less then one day to try and decide, and because no Statement of Decision was requested under California *Civil Code* §632, the Judgment was entered without a Statement of Decision. Nevertheless, the Judgment entered on January 4, 1988, in favor of Petitioners HARNEY & MOORE and DAVID M. HARNEY, and against Respondent JAY MARK FINEBERG, provided that:

> "1. Plaintiff [Respondent] shall take nothing by reason of the complaint on file herein.
>
> 2. *Business and Professions Code* §6146 is inapplicable to the fee agreement dated November 23, 1981 between the parties because Plaintiff [Respondent] knowingly, freely and voluntarily waived the provisions *Business and Professions*

Code §6146 and there is no public policy which would prevent the Plaintiff [Respondent] from knowingly, freely, and voluntarily waiving the provisions of *Business and Professions Code* §6146."

(C.T. pages 81-82)

REASONS FOR DENYING THE WRIT

I.

THE STATE COURT ADDRESSED AND CORRECTLY DECIDED THE FEDERAL QUESTIONS RAISED BY PETITIONERS ON APPEAL

The Petitioners' contention that review by the Supreme Court is appropriate rests on the fallacious premise that the California Court of Appeal "did not address the constitutional issues raised by petitioners". In fact, as the opinion of the Court of Appeal clearly reflects, and as discussed below in greater detail, the Petitioners' constitutional claims that §6146 would violate the due process and equal protection clauses of the Fourteenth Amendment of the United States Constitution, and would deprive litigants of the right to petition for a redress of grievances by employing counsel of their choice, were addressed and then rejected (see *Fineberg vs. Harney & Moore* (1989) 207 Cal App 3d 1049, 1053-1055). The Court of Appeals opinion was not an aberration; it was based upon a careful review of the statute's legislative history, and prior appellate cases which have construed §6146, including the same constitutional challenges raised by Petitioners' in the instant case (see *Fineberg, supra,* at pages 1053-1055).

Petitioners also contend that the limitations imposed by §6146 are voidable pursuant to *California Business and Professions Code* §6146. However, it is noteworthy that §6147 was not enacted as part of the MICRA statutes in 1975, and that it was not in effect when the Respondent signed the Petitioners' retainer agreement on November 26, 1981. Section 6146 was not enacted until 1982.

In addition, the Petitioners' contention that §6147 renders fee agreement subject to §6146 voidable, at the option of the plaintiff, conflicts with the express language of the statute which states that "[a]n attorney *shall not* contract for or collect a contingency fee for representing any person seeking damages in connection with an action for injury or damage against a health care provider. . . ." The word "shall" ordinarily connotes mandatory action when employed in a statute (*Ford Motor Credit vs. Price* (1985) 163 Cal App 3d 745, 749).

In the case of *Hathaway vs. Baldwin Park Community Hospital* (1986) 186 Cal App 3d 1247, the Court of Appeals reviewed the legislative history of §6146 and stated

> "It is abundantly clear . . . that the Legislature considered vesting the trial court with the authority to set reasonable attorneys' fees and specifically rejected this proposal."
>
> (*Hathaway, supra*, at pages 1252-1253).

The Petitioners' argument that the contingency fee agreement here in issue is voidable because it does not recite that the rates set forth in §6146 are the "maximum limits of the contingency fee agreement" ignores the fact that the agreement contains a verbatim statement of the provisions of §6146 (C.T. page 9), reciting the maximum

limits which attorneys may charge clients, as required by §6147(a)(5). Neither §6146 nor §6147 provides that an attorney may charge a fee in excess of the mandatory fee limitations imposed by §6146 by the simple expedient of inducing a client to execute a waiver of those mandatory limits.

Alderman vs. Hamilton (1988) 205 Cal App 3d 1033, cited by the Petitioners, may be distinguished because that case involves a contingent fee agreement in a will contest, and it is not a medical malpractice case subject to §6146. Moreover, the issues raised in *Alderman* were not that the parties' contingency fee agreement violated §6146, but that it violated a statutory requirement of §6147 requiring such agreements to include a statement of how disbursements would affect the contingency fee, any related matters, and that the fee was negotiable (*Alderman, supra,* at page 1037).

The Petitioners are requesting, in essence, that this court reexamine the legal authorities upon which the Court of Appeals relied in authoring its opinion and the California Supreme Court relied in issuing its order denying the Petition for Review. However, the Petitioners' constitutional arguments were previously addressed below by the Court of Appeals, and similar arguments have been raised in numerous prior cases which are referred to in the opinion by the Court of Appeals (*Fineberg, supra,* at pages 1052-1056). The Supreme Court accords "respectful consideration and great weight to the views of a state's highest court" on matters of state law and customarily accepts factual findings of state courts in the absence of "exceptional circumstances" (*California*

Retail Liquor Dealers Ass'n. vs. Midcal Aluminum, Inc. 445 U.S. 97, ___, 100 S.Ct. 937, ___, 63 L.Ed. 2d 233 (1980)).

II.

THE MANDATORY FEE LIMITATION IMPOSED BY CALIFORNIA BUSINESS AND PROFESSIONS CODE SECTION 6146 DOES NOT DEPRIVE A LITIGANT OF HIS RIGHT TO RETAIN COUNSEL UNDER THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT OF THE UNITED STATES CONSTITUTION

Petitioners' argument that the mandatory sliding-scale fee limitation imposed by §6146 would somehow impinge upon the Respondent's constitutional right to retain counsel to represent him in a medical malpractice action is without merit. The Respondent unquestionably had a constitutional right to select and retain counsel to represent him in the underlying medical malpractice action. Due process assures that right (see *Powell vs. Alabama* 287 U.S. 45, 68-69, 53 S.Ct. 55, 64, 77 L.Ed. 159 (1932); *In re Kathy P.* (1979) 25 Cal 3d 91, 102; *Mendoza vs. Small Claims Court* (1958) 49 Cal 2d 668, 673).

However, the due process argument raised by Petitioners misrepresents the impact which §6146 imposes on the constitutional right to employ legal counsel. In *Roa vs. Lodi Medical Group, Inc.* (1985) 37 Cal 3d 920, the California Supreme Court held that §6146 "does not in any way abrogate the right to retain counsel, but simply limits the compensation that an attorney may obtain when he represents an injured party under a contingency fee agreement" (*Roa, supra,* at p. 926). Moreover, the due process clause does not establish a constitutional requirement

that an attorney selected by a party must agree to represent that party. In *Powell vs. Alabama* the Supreme Court held that the due process clause simply requires that a " . . . defendant should be afforded a fair opportunity to secure counsel of his choice" (*Powell, supra,* at page 53).

The right to counsel does not confer a corresponding constitutional right which allows counsel retained in medical malpractice actions to insist that the legal representation be contingent upon waiver of a "public interest" statute which imposes reasonable limitations on attorney's fees. Petitioners have not cited any authority for such a novel proposal.

California *Civil Code* §3513 provides that:

> "Any one may waive the advantage of a law intended solely for his benefit. But a law established for a public reason cannot be contravened by a private agreement."

A statute which is enacted as an expression of California public policy may not be waived by contract when it was established for a public reason (*Cook vs. King Manor and Convalescent Hosp.* (1974) 40 Cal App 3d 782, 792-793).

In *Roa vs. Lodi Medical Group* the California Supreme Court reviewed the public reasons why §6146 was enacted by the California Legislature in 1975. After reviewing the legislative history of the statute, and prior court decisions which had construed other MICRA statutes, the Court concluded that the contingency fee limitations imposed by *Business and Professions Codes* §6146 were rationally related to a valid legislative purpose, and held that a rational basis existed for the Act's attorney fee restrictions (*Roa, supra,* at page 930). The California

Supreme Court determined that the public purpose of the Act was to reduce the cost of medical malpractice insurance and thereby (1) induce hospitals and doctors to resume providing medical care to all segments of society, and (2) guarantee that insurance would be available as compensation for patients injured through medical malpractice (*Roa, supra,* at page 930). The California Supreme Court concluded that the attorney fee limitations of §6146 were rationally related to the foregoing objectives because the statute would encourage plaintiffs to accept lower settlements and would deter attorneys from instituting frivolous suits (*Roa, supra,* at page 931). The California Supreme Court also held that because the MICRA provisions would reduce malpractice victim's recoveries, the attorney fee limitations were necessary to protect their awards from further depletion by high contingency fees (*Roa, supra,* at page 932).

The California Supreme Court also noted that a comparison of the fees permitted under §6146 with the fees authorized under other statutory schemes indicated that §6146's limits are not unusually low, and that the amount of fees permitted does not render the statute unconstitutional on its face (*Roa, supra,* at page 928).

The Petitioners' attempt to demonstrate that the fee limitations imposed by §6146 would, because of financial considerations inherent in a contingency fee arrangement, preclude litigants from engaging the services of experienced counsel or would lower the standard of representation in medical malpractice cases, lacks any factual support and is based upon speculation.

Section 6146 does not *prevent* the Petitioners from earning a living as lawyers, it simply limits the fees which they may recover in handling cases in the subspecialty of medical malpractice tort litigation. The right of attorneys to practice their profession may be made subject to statutory regulations which will be upheld so long as the enactments reflect a rational choice aimed at furthering limited state interests (see *Family Div. Trial Lawyers of Superior Court - D.C., Inc. vs. Moultrie* (C.A.D.C. 1984) 725 F2d 695, 710; *Person vs. Association of Bar of City of New York* (C.A.N.Y. 1977) 554 F2d 534, 537-538, cert. denied, 434 U.S. 924, 98 S.Ct. 403, 54 L.Ed. 2d 282).

III.

THE MANDATORY FEE LIMITATION IMPOSED BY BUSINESS AND PROFESSIONS CODE SECTION 6146 DOES NOT DEPRIVE A LITIGANT OF THE CONSTITUTIONAL RIGHT TO PETITION THE GOVERNMENT FOR A REDRESS OF GRIEVANCES

Although there is a constitutional right of access to the courts which arises from the due process clause (*Wolff vs. McDonnell*, 418 U.S. 539, 579, 94 S.Ct. 2963, 2986, 41 L.Ed. 2d 935 (1974)), the privileges and immunities clause (*Chambers vs. Baltimore & Ohio Railroad*, 207 U.S. 142, 148, 28 S.Ct. 34, 35, 52 L.Ed. 143 (1907)), and the First Amendment (*California Motor Transport vs. Trucking Unlimited*, 404 U.S. 508, 513, 92 S.Ct. 609, 613, 30 L.Ed. 2d 642 (1972)), "[t]here is no *absolute* and unlimited constitutional right of access to the courts" (*Ciccarelli vs. Carey Canadian Mines, Ltd.* (1985) 757 F2d 548, 554). All that is required is a reasonable right of access; i.e., a reasonable opportunity to be heard (*Boddie vs. Connecticut*, (1974) 401

U.S. 371, 378, 91 S. Ct. 780, 786, 28 L. Ed. 2d 113). The Constitution simply requires "an opportunity . . . granted at a meaningful time and in a meaningful manner" (*Armstrong vs. Manzo* (1965) 380 U.S. 545, 552, 85 S.Ct. 1187, 1191, 14 L.Ed. 2d 62, 66), "for [a] hearing appropriate to the nature of the case" (*Mullane vs. Central Hanover Trust Co.*, 339 U.S. 306, 313, 70 S.Ct. 652, 656-657, 94 L.Ed. 865, 873 (1950)).

Petitioners' argument on this issue is based upon the erroneous assumption that a reasonable regulation of attorney's fees represents a constitutional deprivation of a litigant's right to seek a redress of grievances through the courts. However, *Business and Professions Code* §6146 does not prevent those injured by medical malpractice from seeking redress through the courts; it only limits the fees which counsel retained to represent such litigants may charge. As noted above, legislatures may subject attorneys to statutory regulations which further a legitimate public interest.

Furthermore, a lawyer's opportunity to obtain remunerative employment is a subject which is only marginally affected with First Amendment concerns, and it is a subject which falls within the state's proper sphere of economic and professional regulation (*Ohralik vs. Ohio State Bar Ass'n.* (1978) 436 U.S. 447, 459, 98 S.Ct. 1912, 1920, 56 L.Ed. 2d 444, reh. denied, 439 U.S. 883, 99 S.Ct. 226, 58 L.Ed. 2d 198). The state's interest in such cases is particularly strong because in addition to its general interest in protecting consumers and regulating commercial transactions, the state has a special responsibility for maintaining standards among members of the licensed professions (*Ohralik, supra*, at page 460).

> "We recognize that the States have a compelling interest in the practice of professions within their boundaries, and that as part of their power to protect the public health, safety, and other valid interests they have broad power to establish standards for licensing practitioners and regulating the practice of professions.
>
> * * *
>
> The interest of the States in regulating lawyers is especially great since lawyers are essential to the primary governmental function of administering justice, and have historically been 'officers of the courts'." (*Goldfarb vs. Virginia State Bar*, 421 U.S. 773, 792, 95 S.Ct. 2004, 44 L.Ed. 2d 572 (1975)).

A regulatory statute, such as §6146, is not invalid merely because it does not cover the whole of a permissible field. The presumption, in such instances, should always be to uphold a classification based on legislative experience, and not to reject it unless plainly arbitrary (*Borden's Farm Products Co. vs. Baldwin*, 293 U.S. 194, 209, 55 S.Ct. 187, 192, 79 L.Ed. 281 (1934)).

IV.

THE MANDATORY FEE LIMITATION IMPOSED BY CALIFORNIA BUSINESS AND PROFESSIONS CODE SECTION 6146 DOES NOT DEPRIVE A LITIGANT OF THE CONSTITUTIONAL RIGHT TO EQUAL PROTECTION OF THE LAWS GUARANTEED UNDER THE FOURTEENTH AMENDMENT OF UNITED STATES CONSTITUTION

As discussed above, the California Legislature had a valid "public reason" for enacting the MICRA statutes, including §6146, in 1975. Furthermore, California *Civil*

Code §3513 provides that a law established for a public reason cannot be contravened by a private agreement.

The classification imposed by §6146 was based upon a legislative determination, after lengthy deliberation, that imposing limits on fee agreements in medical malpractice cases was a necessary step in order to deal with a growing crisis in the field of health care delivery in the State of California. (see *Roa, supra,* at pages 930-931; *Fineberg, supra,* at pages 1052-1053). Although the statute discriminates between attorneys who represent parties claiming injuries resulting from medical malpractice and attorneys representing other types of tort claimants, the discrimination is nevertheless based upon the underlying legislative purpose embraced by the MICRA statutes of combating a crisis concerning health care delivery and medical malpractice insurance. (see *Roa, supra,* at pages 930-932; *Fineberg, supra,* at pages 1053-1054).

> "Statutory discrimination between classes which are in fact different must be presumed to be relevant to a permissible legislative purpose, and will not be deemed to be a denial of equal protection if any state of facts could be conceived which would support it."
>
> (*Asbury Hosp. vs. Cass County,* 326 U.S. 207, 215, 66 S.Ct. 61, 65, 90 L.Ed. 6 (1945); see also *Roa, supra,* at page 930).

Unless a statute requires "strict judicial scrutiny" because it interferes with a "fundamental right" or discriminates against a "suspect class" it will ordinarily withstand an equal protection attack so long as the challenged classification is rationally related to a legitimate government purpose (*Kadrmas vs. Dickinson Public*

Schools, ___ U.S. ___, 108 S.Ct. 2481, 2487, 101 L.Ed. 2d 339 (1988)).

> "[T]he Equal Protection Clause is offended only if the statute's classification 'rests on grounds wholly irrelevant to the achievement of the State's objective.' (Citations omitted). Social and economic legislation like the statute at issue in this case, moreover, 'carries with it a presumption of rationality that can only be overcome by a clear showing of arbitrariness and irrationality.' (Citation omitted). '[W]e will not overturn such a statute unless the varying treatment of different groups or persons is so unrelated to the achievement of any combination of legitimate purposes that we can only conclude that the legislature's actions were irrational.' (Citation omitted). In performing this analysis, we are not bound by explanations of the statute's rationality that may be offered by litigants or other courts. Rather, those challenging the legislative judgment must convince us that the legislative facts on which the classification is apparently based could not reasonably be conceived to be true by the governmental decisionmaker.' (Citation omitted)."
>
> (*Kadrmas, supra*, at pages 2489-2490).

Petitioners' argument that §6146 somehow impinges upon a fundamentally vested constitutional right which they possess is mistaken. It is well-settled that the Constitution does not create fundamental interests in the availability of employment opportunities (*Massachusetts Board of Retirement vs. Murgia* 420 U.S. 307, 313, 96 S.Ct. 2562, 2566, 49 L.Ed. 2d 520 (1976); *Dandridge vs. Williams*, 397 U.S. 471, 485, 90 S.Ct. 1153, 1162, 25 L.Ed. 2d 491 (1970)). Section 6146 simply establishes a maximum limit on

attorney's fees which may be charged in medical malpractice cases, it does not prevent the Petitioners, or other attorneys, from practicing in the field of medical malpractice, tort law generally, or indeed the general practice of law. In any event, the right to practice law is not a fundamental right for purposes of due process or equal protection analysis (*Edelstein vs. Wilnetz* (1987) 812 F2d 128, 132; *Lupert vs. California State Bar* (1985) 761 F2d 1325, 1327, fn. 2).

CONCLUSION

The federal issues raised by Petitioners lack substance, have previously been considered by the Supreme Court, or are consistent with prior decisions of the Supreme Court and the lower federal courts. No reviewable question is properly placed before this Court and accordingly Respondent respectfully submits that the Petition for Writ of Certiorari should be denied.

DATED: August 21, 1989

Respectfully submitted,

By: Marshall C. Sanders and
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